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Supreme Court of the United States

October Term, 1944

No. 1316

In the Matter of The New York, New Haven and Hartford Railroad Company, Principal Debtor, and Old Colony Railroad Company, Subsidiary Debtor.

HOMER N. CHAPIN, WALTER A. PAXTON, AND SAMUEL S. HALL, JR., AS EXECUTIVE COMMITTEE FOR INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS, *Petitioners,*

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, *et als., Respondents.*

PETITION OF INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Abbreviations

The following abbreviations as used in this brief are intended to have the respective meanings stated below unless the context indicates a different meaning.

"Court" or "District Court"—The District Court of the United States for the District of Connecticut.

"Massachusetts Court"—The District Court of the United States for the District of Massachusetts.

"Commission"—Interstate Commerce Commission.

"Debtor"—New York, New Haven and Hartford Railroad Company.

"Debtor railroads"—New York, New Haven and Hartford Railroad Company and Old Colony Railroad Company.

"New Haven"—New York, New Haven and Hartford Railroad Company.

"Old Colony"—Old Colony Railroad Company.

"Boston and Providence"—Boston and Providence Railroad Company.

"New England"—The New England Railroad Company.

"Boston Terminal" or "Terminal Company"—The Boston Terminal Company.

Citations to Record

Citations to the Record are to the abbreviated Record prepared and filed herewith under Stipulation of Counsel, Rec. pp. 244-249.

Supreme Court of the United States

October Term, 1944

No. .....

In the Matter of The New York, New Haven and Hartford Railroad Company, Principal Debtor, and Old Colony Railroad Company, Subsidiary Debtor.

HOMER N. CHAPIN, WALTER A. PAXTON, AND SAMUEL S. HALL, JR., AS EXECUTIVE COMMITTEE FOR INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS, *Petitioners,*

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, *et als., Respondent.*

PETITION OF INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Homer N. Chapin, Walter A. Paxton and Samuel S. Hall, Jr., as Executive Committee for Institutional Group for Boston Terminal Bonds, (a group formed under §77(p) of the Bankruptcy Act of insurance companies holding bonds of the Boston Terminal Company), respectfully petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an order entered by said Court in the above pro-

ceeding on January 30, 1945 affirming in part and reversing in part an order of the District Court of the United States for the District of Connecticut entered on March 6, 1944 approving a plan of reorganization for the New York, New Haven and Hartford Railroad Company, principal debtor and the Old Colony Railroad Company, subsidiary debtor.

Opinions Below

Opinions of District Court—Opinions October 30, 1939 (not reported)*; December 21, 1943 on Fourth Plan, 54 Fed. Supp. 595**; and of March 6, 1944 approving Fifth Plan, 54 Fed. Supp. 631†. Opinions of Circuit Court of Appeals—January 2, 1945, and January 23, 1945, 147 F. (2d) 40.††

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 USC §347(a)), and Section 24(c) of the Bankruptcy Act (11 USC §47(c)). The order of the Circuit Court of Appeals for the Second Circuit was entered on January 20, 1945.‡ Time for filing the petition was extended to May 31, 1945 by order of March 21, 1945.‡‡

Statutes

The matter herein presented involves the consideration and construction of an Act of the General Court of Massachusetts (Mass. Acts and Resolves 1896, Chapter 516) printed in full in the Record*†; and Section 77 of the National Bankruptcy Act (11 USC §205).

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*Rec. p. 6159.
**Rec. p. 10695.
†Rec. p. 11024.
††Rec. p. 11525.
‡Rec. p. 240.
‡‡Rec. p. 167.
*†Rec. p. 243.

Statement of the Matter Involved

1. *The Boston Terminal Company*—Prior to the creation of Boston Terminal there had been five railroads operating trains from the South and West into, and authorized to do a passenger business in, the City of Boston. They were the Boston and Albany*, New England, Old Colony, Boston and Providence and New Haven. In 1888 Old Colony had leased the Boston and Providence for a period of 99 years. In 1893 the New Haven had leased the Old Colony, (including its unexpired leasehold interest in Boston and Providence), for a period of 99 years. In or about 1895 the New Haven had acquired stock control of New England, which was subsequently merged into New Haven. Each of the five railroad companies named except the New Haven owned lines of railroad extending into and terminating in the City of Boston. The New Haven operated its trains into Boston over the tracks of its leased or controlled lines aforesaid. The respective passenger terminals of the lines mentioned were widely separated, and were reached by tracks crossing streets and other tracks at grade. These conditions resulted in danger and inconvenience to the public. This led to a movement, under the leadership of the Mayor of Boston with the cooperation of the New Haven, for the creation of a joint terminal "to provide adequate terminal facilities for the several railroad companies" named in the act, and "for the accommodation of the public," and to require all of these railroad companies to use the same for "all of their terminal passenger business in Boston".**

*See Massachusetts Acts 1872, Chap. 143 as to Old Colony; 1831 Chap. 56 as to Boston and Providence; 1895 Chap. 484 as to New England; 1867, Chap. 270 as to Boston and Albany; 1872 Chap. 171 as to New Haven; also see Mass. Acts 1905 Chap. 252 authorizing merger of New England with New Haven; Mass. Acts 1872, Chap. 143; Mass. General Law, Chap. 159, §16, 16a; Chap. 160, §128.

**For history of the Boston Terminal and the purposes thereof see

To this end the Boston Terminal Company (hereinafter called Terminal Company) was incorporated by special act of the Legislature of Massachusetts in 1896* to construct and operate a passenger terminal in the City of Boston to be used jointly by the five railroads named in the Act and "for the accommodation of the public in connection therewith."

The plan embodied in the Act for financing, construction and operation of the terminal may be briefly summarized as follows:

(a) The City of Boston was required to expend not exceeding $2,000,000 (§13) in closing and opening streets and providing other facilities to remove existing hazards of grade crossings and to provide access to the terminal.

(b) Bonds were to be issued by the Terminal Company in an aggregate amount to be approved by the State Board of Railroad Commissioners (now Department of Public Utilities) to bear interest at not exceeding 4% and to be approved investments for savings institutions from date of issue (Sec. 4).**

(c) Stock of the Terminal Company was to be issued in the aggregate amount of $500,000 (less than 1/30 of the cost of the terminal) (Sec. 2). Each of the railroad companies aforesaid specifically named in Sec. 2 of the Act was authorized to, and did, subscribe for one fifth, or $100,000

*Rec. p. 167.

**Under this provision bonds were issued from time to time, in the aggregate principal amount of $15,500,000 of which $13,992,000 principal amount of 3½% bonds mature February 1, 1947, and $1,163,000 principal amount of 4% bonds mature July 1, 1949. Petitioners are holders of over $800,000 principal amount of these bonds.

Baker—*"Formation of the New England Systems"* 37 Harvard University Press, Chaps. 3 and 4; Statement of Hon. Josiah Quincy, Mayor of Boston, before the Committee considering the Massachusetts Act of 1896, Mass. Public Library.

par value, of this stock. Dividends upon this stock were limited to 4%.

(d) The management of the Terminal Company was vested in a board of five "Trustees," one to be appointed by each of the railroads named in Sec. 2 of the Act (Sec. 3); but all plans for construction of the terminal were subject to approval of the Mayor of Boston and the Board of Railroad Commissioners of the State (now Department of Public Utilities), and all rules and regulations for the operation thereof were subject to like approval (Secs. 6 and 8).

(e) The five railroad companies named in Section 2 of the Act were mandatorily required (1) to use the Terminal "for all of their terminal passenger business in Boston instead of the passenger terminals now used by them" (Sec. 9); (2) to pay therefor "in monthly instalments", amounts necessary to pay all operating expenses, taxes and bond interest of the Terminal Company together with an amount equal to not exceeding 4% on its stock, and it was expressly provided that such payments shall be "deemed a part of their operating expenses" (Sec. 10); (3) in event of foreclosure of any mortgage given by the Terminal Company to secure its bonds, to pay any deficiency which might result therefrom "so that full payment of the principal and interest of the bonds issued under the provisions of this Act by the Terminal Company shall in no event fail" (Sec. 4); and (4) original jurisdiction was conferred by the Act upon the Supreme Judicial Court of Massachusetts to enforce by summary proceedings the use of the terminal, the payments so required to be made, and other provisions of the Act.

(f) The required payments were to be made by the several railroads on basis of user. In event of their inability to agree, the several proportions were to be fixed by the State Board of Railroad Commissioners (now Department of

Public Utilities). By order of this tribunal of July 17, 1931, on petition of the New Haven, these proportions were fixed at 70% for the New Haven, (then successor by merger to the New England, and lessee of Old Colony and Boston and Providence) and 30% for the New York Central, then lessee of Boston and Albany.* This order is still in force.

Each of the five railroads named subscribed its proportions of the stock. The terminal was completed and use thereof begun in 1899 which has since continued. Payments under the Act and the order aforesaid were made by the New Haven up to the time of the institution of these proceedings; thereafter by the Trustees in Bankruptcy until November 1939, when payments on account of interest and taxes of the Terminal Company were discontinued by administrative order of the District Court as hereinafter stated.

2. *Bankruptcy Proceedings*—Bankruptcy proceedings of New Haven were instituted in October 1935 and Trustees appointed. There was then no default as to the obligations of the terminal. There were no executory contracts or leases between the Terminal and the user railroads.

In June 1936 the Trustees of New Haven disaffirmed the lease of Old Colony. A majority of the stock of Old Colony was owned by New Haven. It was immediately petitioned into bankruptcy in the New Haven proceedings. The same persons who were trustees of the New Haven were also appointed trustees for Old Colony. The trustees of the New Haven were directed to operate Old Colony for account of the lessor or its trustees.** Operation of the Boston and Providence was continued by the New Haven trustees for account of Old Colony under the lease to Old Colony until July 1938. The Court then directed the trus-

*Rec. p. 199.

**Rec. p. 7870.

tees of Old Colony to disaffirm the Boston and Providence lease. By the same order the Court directed that the trustees of the New Haven should continue to operate Boston and Providence for account of the lessor but without expense to the New Haven.* The Boston and Providence was then petitioned into bankruptcy in the U. S. District Court for Massachusetts. The proceedings are still pending.

On October 30, 1939 the Court directed the trustees of the New Haven to discontinue advances to Old Colony and Boston and Providence for payment of interest and taxes of the Terminal Company under the Massachusetts Act of 1896. In its opinion on which this order was based, the Court held that the obligations of the Massachusetts Act of 1896 were imposed upon the New Haven only "as lessee" of the Old Colony; that the disaffirmance of that lease relieved the New Haven of all obligations under the Act (except as to New England which was not at the moment using the terminal) including the charges for use of the Terminal prescribed by Sec. 10 thereof.** On appeal the order of the District Court was reversed, but the Circuit Court of Appeals declined to decide the question as to the obligations of New Haven under the Act of 1896.† On *certiorari* to this Court the order of the District Court was affirmed as an "administrative order" suspending advances by the New Haven, but this Court refused to decide, or to express any opinion as to, the obligations of New Haven under the Act of 1896.††

The Terminal Company was then petitioned into bankruptcy in the United States District Court of Massachusetts by certain of its bondholders on November 3, 1939. A trustee was duly appointed who has since administered the

*Rec. pp. 7870, 7876.

**Rec. pp. 6151, 6152, 6159.

†*Webster and Atlas Bank* v. *Palmer*, 111 Fed. (2) 215.

††*Palmer* v. *Webster and Atlas Bank*, 312 U. S. 156, 168.

property. These proceedings are still pending. No plan of reorganization of the Terminal Company has been reported.

3. *Reorganization Proceedings*—In March 1940, Division 4 of the Commission reported a plan of reorganization for the New Haven excluding the Old Colony therefrom.* On rehearing before the full Commission that body reported a modified plan including both New Haven and Old Colony.** Neither of these plans proposed any modification of obligations of the debtor railroads under the Act of 1896.

In the hearing before the District Court on the Second Plan the chief question at issue was as to whether the New Haven should acquire Old Colony, and if so, on what terms. The Court "informally" appointed a committee to canvass the situation and see if the differences between Old Colony and New Haven interests could be adjusted. This committee consisted of counsel for certain New Haven and Old Colony interests and an Assistant Attorney General of Massachusetts, all of the parties acting "personally" and not "officially".†

Some three months after this hearing but before any decision thereon, the Committee "handed" to the Court a report in which it was proposed, for the first time in this proceeding that the obligations of the debtor railroads under the Act of 1896 should be so modified that the obligations on account of interest on terminal bonds should be reduced from their proportion $536,240 to their proportion of $275,000 per annum, effective from 1939 when the last interest payment had been made. Neither the Bankruptcy Trustee of the Terminal Company, the trustee in its mortgage nor any of its bondholders were parties to the New

*Rec. pp. 7863, 7990.

**Rec. p. 8037.

†Rec. pp. 8958, 8963, 9013, 9015.

Haven proceeding.* They were not consulted as to this proposal.

In December 1941 the Court disapproved the plan of the Commission. Without any hearing on the report of the committee it held that some reduction should be made in the obligations of the debtor railroads to the Terminal Company under the Act of 1896, attached the report of the Compromise Committee to its opinion and "commended" it for the consideration of the Commission.**

Upon return of the proceedings to the Commission further hearings were held before examiners on February 17-19, 1942. At the conclusion of these hearings the record was closed except that it was kept open for the purpose of receiving further proposals from the so-called Compromise Committee appointed by the Court.† The terminal interests aforesaid were not parties to the proceeding and did not appear at this hearing.

In April 1942 the Committee, without notice to anyone, submitted to the Commission a report in which certain Old Colony and New Haven interests joined.†† By this Joint Report it was proposed (1) that not only should the payments of the debtor railroads on account of interest on Boston Terminal bonds be reduced from their proportion of $536,240 to their proportion of $275,000 per annum effective from 1939, as proposed in the previous report to the Court; but in addition thereto it was now proposed for the first time (2) that the *obligation to use* the terminal as

*The trustee in the terminal mortgage had intervened specially in 1939 to be heard upon and to appeal from Order 398 suspending advances by New Haven for payment of interest and taxes of the Terminal Company, but this intervention was specifically limited to that one order.

**Rec. pp. 8923, 8958.

†Rec. p. 9761.

††Rec. p. 207.

mandatorily required by Section 9 of the Act of 1896, and to make the payments therefor, as required by Section 10 of said Act, should be *entirely abrogated,* with the option to the *debtor railroads* to continue the use of the terminal and to make payments therefor on the reduced basis proposed in the report if, and so long as, they elected to do so; (3) to *abrogate entirely* the obligation imposed upon the user railroads by Section 4 of the Act to pay any deficit on the bonds of the Terminal Company in event of foreclosure; and (4) to give to the user-railroads the revenues of the Terminal Company from rentals and concessions as a credit against expenses of the Terminal which they were required to pay under §10 of the Act. None of the terminal interests were parties to the proceeding at that time. No hearing was had on these proposals before the Commission. In its Report and Order approving its Third Plan, however, the Commission adopted those proposals *in totidem verbis* as a part of its plan.

Upon the publication of this plan petitioners promptly organized the Institutional Group for Boston Terminal bonds to protect their interest in the premises, and filed a petition of intervention before the Commission. They were admitted as parties. Within the statutory period of sixty days* they filed before the Commission, on December 4, 1942, their petition urging the illegality and inequity of the plan, the inadequate, incomplete and misleading character of the evidence as to the terminal, and prayed leave to produce evidence and to be heard upon the plan in so far as it dealt with their rights and interests.** In July 1944 the Commission rendered its Fourth Supplemental Report and Order in which it declined to reopen the matter for hearing on the proposals of the Joint Report, and denied leave to petitioners to introduce evidence or to be heard, but again adopted in

*Section 77(d), 11 USC. § 205.

**Rec. p. 53.

terms the proposals of the Joint Report as to the modification or abrogation of the obligations of the debtor railroads under the Act of 1896.* The plan was immediately certified to the Court.

Joint and several objections to the plan and claims for equitable treatment were duly filed by petitioners and various other parties to the proceeding.** Petitioners and other Terminal interests also filed motions for leave to introduce evidence before the Court in support of their objections and claims and then tendered in open court offers of proof setting forth what they desired to prove, showing the relevancy and materiality thereof. The Court refused to receive any evidence but allowed the offers of proof to be filed.†

On December 21, 1943 the court handed down its opinion on the Fourth Supplemental Plan.†† It held that various essential provisions of the plan were illegal or inequitable and could not be approved; but also held that the Court had a right to modify these provisions including a redistribution of securities to conform to such modification, and then to approve the plan as modified, without a return of same to the Commission. It also undertook to "construe" the provisions of the plan for the absolute modification or abrogation of the obligations of the debtor railroads under the Act of 1896 into an offer which the Terminal Company or its Bankruptcy Trustee could elect to accept or reject, and held that the decree would define the time within which this option might be exercised. There was no suggestion of an "offer" in the Plan of the Commission. This was therefore a radical departure from or modification of the Plan as approved and certified by the Commission.

*Rec. pp. 10123, 10158-10163.

**Rec. p. 10383.

†Rec. p. 11011.

††54 Fed. Supp. 595, Rec. p. 10695.

In concluding its opinion the Court said:

> ". . . if the Commission after reading my opinion shall wish of its own motion to file any supplemental report or order whether adapted to confirm my proposed action or require action in another direction, I shall be glad to shape my decree accordingly."*

The Court overruled a motion for an order disapproving the Fourth Plan and returning the proceedings to the Commission as required by Section 77(e).** Petitioners then filed with the Commission their objections to any further proceedings before the Commission until the Fourth Plan which the Court had held to be illegal and inequitable, was disapproved by the Court and the proceedings returned for further action of the Commission; and until hearings were then had thereon as required by §§77(e) and (d).† These objections were overruled by the Commission.

On February 8, 1944, (about eight months after the Fourth Plan had been certified to the Court), the Commission without return of the proceedings as required by §77(e) and *without notice or hearing to anyone,* approved and certified to the Court a Fifth Plan and order thereon "revoking and superseding" all former orders including that on the Fourth Plan which was still pending before the Court, no order having been entered thereon.†† The Fifth Plan was essentially different from the Fourth Plan. By Section N(1)(a) of the Fifth Plan the Commission again adopted the proposal of the Joint Report for modification of the obligations of the user railroads as to Boston Terminal, but also adopted the construction of the Court

*Rec. p. 10760.
**Rec. p. 10823.
†Rec. p. 69; Rec. p. 10834.
††Rec. pp. 10831, 10923.

"to recognize a right in the Terminal Company such as *a lessor of a lease rejected by Trustees in Bankruptcy* would have to make its own election as to whether it would repossess or would acquiesce in the continued operation of the user railroads under the terms proposed in the plan."* (Italics provided)

Although the Act of 1896 which was the charter of the Terminal Company, was mandatory in its terms requiring the use of the terminal by the debtor railroads and prescribing the terms of such use, and excluded any right of the Terminal Company or the user railroads to contract as to the use or the terms thereof, the Fifth Plan provided in effect that the Bankruptcy Trustee of Terminal Company should within a time to be prescribed by the Commission, either accept the modified terms for such use proposed therein, or reject the same, exclude the user railroads and file claim for damages within two weeks, or be forever barred from asserting any claim for breach of the obligations imposed by the Act of 1896.

Thereupon petitioners filed a written motion to strike the Fifth Plan from the files of the Court upon the grounds (a) that the Commission was without jurisdiction to report or certify the same without disapproval and return of the Fourth Plan as required by §77(e); and (b) that the Fifth Plan had been prepared and certified without notice or an opportunity to be heard to any of the parties in interest as required by Section 77(d).** This motion was overruled.

Petitioners then filed objections and claims for equitable treatment as to the Fifth Plan and moved for leave to introduce evidence before the Court in support thereof.† Leave

*Rec. p. 10847. There was no lease, no legal authority to make one, and the property of the Terminal Company was in possession of and being operated by the Bankruptcy Trustee appointed by the District Court of Massachusetts.

**Rec. p. 10983.

†Rec. pp. 10962, 11007.

to introduce any evidence was denied. Petitioners thereupon filed their further offers of proof which were made a part of the record.* Objections to the plan and claims to equitable treatment were overruled. The Fifth Plan was approved by order of the Court on March 6, 1944.** From this order appeal was duly taken to the Circuit Court of Appeals for the 2nd Circuit.

4. *Action of the Circuit Court of Appeals*—On January 2, 1945 the Circuit Court of Appeals handed down its opinion reversing the order of the District Court as to the claims of certain banks and the treatment of Old Colony bonds and affirming the order as to all other appellants including petitioners.† Petitions to rehear were duly filed by certain of the parties in interest. A joint motion was filed by petitioners and other terminal parties for stay of the mandate pending an application to this Court for writ of certiorari. By order of January 30, 1945 the Court denied the petitions for rehearing, overruled the motion for stay of mandate and remanded the cause "with leave to the District Judge to remand to the Commission all or any portion of the plan if in his opinion it is desirable to have the Commission consider further any provisions of the plan in addition to those affecting Old Colony."††

Questions Presented

1. Were the several acts and proceedings of the Commission (a) in denying to petitioners a hearing upon the proposals contained in the Joint Report of the Compromise Committee and others; (b) in overruling the objections of petitioners to further proceedings before the Commission

*Rec. p. 11011.

**Rec. p. 11050.

†147 F. (2d) 40; Comp. Rec. p. 11525.

††Rec. pp. 241, 242.

unless and until the Fourth Plan was returned to the Commission and further hearings were had thereon; and (c) in reporting the Fifth Plan "revoking and superseding" all previous orders of the Commission while the Fourth Plan was still pending before the Court, and without any hearing as to said Fifth Plan, in violation of the provisions and requirements of Section 77 of the Bankruptcy Act or a denial to petitioners of due process of law?

2. Were the several acts or proceedings of the District Court (a) in failing and refusing to disapprove the Fourth Plan after it had held the same to be illegal and to dismiss the proceedings or return the same to the Commission for further action under Section 77(d); (b) in holding that it had power to modify the Fourth Plan as proposed without a return of the proceedings to the Commission; (c) in receiving and acting upon the Fifth Plan as reported and certified by the Commission, and (d) in refusing to permit petitioners to present evidence and to be heard thereon in support of their objections and claims for equitable treatment as to the Fifth Plan, or any of them, in violation of the provisions and requirements of Section 77 of the Bankruptcy Act, or a denial to petitioners of due process of law under the Fifth Amendment to the Constitution of the United States?

3. Did the rights conferred and duties and obligations imposed upon the user railroads as to Boston Terminal by the Massachusetts Act of 1896 apply to the New Haven as such or only "as lessee" of Old Colony; and did said rights, duties and obligations continue as to the New Haven after the disaffirmance of the lease of Old Colony to New Haven?

4. Were the terms, conditions and provisions of the offer contained in Section N(1)(a) and N(1)(b) of the Fifth Plan unlawful and invalid as being in violation of the

mandatory provisions of the Massachusetts Act of 1896 which were binding alike upon the debtor railroads and the Bankruptcy Trustee of the Terminal Company; and as to the Terminal Company in violation of the provisions of its charter?

5. Did the Commission or the District Court of Connecticut have power under the provisions of Section 77 of the Bankruptcy Act to require the Bankruptcy Trustee of the Terminal Company appointed by and subject to the orders of the District Court of Massachusetts to elect whether to accept or reject the so-called offer contained in the Fifth Plan prescribing terms and conditions as to the user of the Boston Terminal entirely different from those prescribed in the Massachusetts Act of 1896 which constituted the Charter of the Terminal Company; and did the District Court of Massachusetts have power to authorize the Bankruptcy Trustee to exercise said election?

6. Did the provisions of the Massachusetts Act of 1896 imposing upon the debtor railroad companies the duties and obligations set forth therein as to Boston Terminal constitute amendments to the respective charters of the debtor railroads; and if so, did the Commission have power by a plan of reorganization of the debtor railroads in a proceeding under Section 77 of the Bankruptcy Act to further amend said charters to modify or abrogate the said duties and obligations as proposed in the Fifth Plan?

7. Did the provisions of the Massachusetts Act of 1896 imposing upon the debtor railroads the duties and obligations therein set forth constitute an exercise of the police power of the Commonwealth of Massachusetts; and if so, did the Commission and District Court have power by a plan of reorganization in a proceeding under Section 77 of the Bankruptcy Act to modify or abrogate the several

duties and obligations so imposed upon the debtor railroads as to Boston Terminal?

8. Did the provisions of Section 77(f) of the Bankruptcy Act confer upon the Commission any substantive power in the preparation of a plan of reorganization or enlarge the powers of the Commission under sub-section (b) of said Act, and did the Court in this case correctly construe and apply the provisions of said Section 77(f) of the Bankruptcy Act?

9. Could the Commission and the District Court in a proceeding under Section 77 of the Bankruptcy Act exercise powers conferred upon the Commission by the Interstate Commerce Act derived from an entirely different clause of the Constitution; and did the Interstate Commerce Act, even if applicable, confer upon the Commission or the District Court any power or authority by a plan of reorganization under Section 77 of the Bankruptcy Act to modify or abrogate the duties and obligations as to Boston Terminal imposed upon debtor railroads by the Massachusetts Act of 1896?

10. Did the Commission have power by a plan of reorganization of the debtor railroads under Section 77 of the Bankruptcy Act to take from the Terminal Company or its Bankruptcy Trustee, revenues derived from rentals and concessions in the terminal building and give the same to the debtor railroads as a credit against expenses which said debtor railroads were required to pay under Section 10 of the Act of 1896; or did this proposed action constitute a taking of the property of the Bankruptcy Trustee and creditors of the Terminal Company for use of the debtor railroads or their creditors without due process of law and without compensation in violation of the Fifth Amendment to the Constitution of the United States?

11. Was the decision of the court below that the provisions of the approved plan based on, and part of, the compromise arrangement as to Old Colony embodied in the Joint Report of the Compromise Committee and others which was held to be invalid as to bondholders of Old Colony but valid as to Boston Terminal interests, also unlawful and invalid as to Boston Terminal interest and in violation of applicable decisions of this Court?

12. Were the provisions of the approved plan as to the rights and interests of the Bankruptcy Trustee and creditors of the Terminal Company fair and equitable, nondiscriminatory and otherwise in conformity with the requirements of Section 77(e) of the Bankruptcy Act?

Reasons Relied on for Allowance of the Writ

1. *As to questions of procedure.*—Section 77(d) of the Bankruptcy Act requires that before the Commission may report a plan of reorganization it shall "hold public hearings at which an opportunity shall be given any interested party to be heard." This Court has held that a hearing includes the right to present evidence; that it is essential to due process of law; that even where there have been hearings the introduction of new proposals or issues make necessary a further hearing thereon.* In this case the Joint Report of the Compromise Committee and others was filed with the Commission after the record was closed as to all other parties.** It contained proposals for the modification or abrogation of the obligations of the debtor railroads under the Act of 1896, some of which at least, had never before been suggested, on which no hearing had been held. The Com-

*In re Wood and Henderson, 210 U. S. 246, 254, approving the rule as stated by Judge Sanborn; *In re Rosser*, 101 Fed. (CCA 8) 562, 567; *Ohio, Bell Telephone Company* v. *Commission*, 301 U. S. 292, 304; *Morgan* v. *U. S.*, 304 U. S. 1, 18, 22.

**Rec. p. 9761.

mission denied leave to petitioners to introduce evidence and to be heard as to these proposals which vitally affected their rights and interests. It then adopted the proposals in full as a part of its Fourth Plan. Later, over objections of petitioners, it again adopted and certified its Fifth Plan including the same proposals without notice or hearing to anyone. These proceedings of the Commission were approved by the District Court and affirmed by the Circuit Court of Appeals. The Court thus decided an important question of Federal law in a manner probably in conflict with the applicable decision of this Court, and so far sanctioned departures from the accepted and usual course of judicial proceedings as to call for an exercise by this court of its power of supervision.

(b) Section 77(d) of the Bankruptcy Act provides that after a plan is approved the Commission shall "certify the plan to the Court" together with a "transcript of the proceedings." Jurisdiction of the proceeding then passes to the Court. The Circuit Court of Appeals for the Ninth Circuit has held that proceedings on reorganization plans cannot be pending in two tribunals at the same time.* In this case the Commission, without notice or hearing, and over objections of petitioners, reported a new plan of reorganization "revoking and superseding" all former orders while the Fourth Plan was still pending before the Court. In approving this procedure the court below rendered a decision which is apparently in conflict with the requirements of the statute and of the Fifth Amendment; in conflict with the decision of the Circuit Court of Appeals of the Ninth Circuit in a similar matter; and has sanctioned such a departure from the accepted and usual course of judicial pro-

*_Rogers_ v. _Consolidated Rock Products Co._, 114 Fed. (2d) (CCA 9) 108, 110. While this was a proceeding under Section 77 B, the principle involved seems to be the same.

ceedings as to call for the exercise by this Court of its power of supervision.

(c) Section 77(e) of the Bankruptcy Act requires that if the Court finds that plan of reorganization is not in conformity with the requirements of said section it shall enter an order in which it may "either dismiss the proceedings" or return the same to the Commission for further proceedings "under the provisions of sub-section (d) hereof." In this case the District Court found that the Fourth Plan was illegal in essential particulars and could not be approved as certified. It overruled a motion to enter an order disapproving the plan and returning the proceedings to the Commission,* and held that it could modify the plan and approve the same as modified. This Court has held that the District Court has no power to modify or "improve" a plan.** Without entering any order on the Fourth Plan the District Court invited the Commission "on its own motion" to submit a further plan. The Commission then without any hearing submitted its Fifth Plan and by its order thereon "revoked and superseded" all previous orders. Petitioners objected to the Fifth Plan being received and acted upon by the Court.† These objections were overruled. Petitioners then filed objections and claims for equitable treatment as to the Fifth Plan and asked leave to present evidence before the Court and to be heard in support of their objections and claims.†† The Court denied this leave and refused to receive any evidence on the Fifth Plan, which plan was then approved. In approving this procedure the Circuit Court of Appeals rendered a decision which is apparently in di-

*Rec. p. 10823.

**_Ecker_ v. _Western Pacific R. Corp._, 318 U. S. 448, 474.

†Rec. p. 10983.

††Rec. pp. 10962, 11007.

rect conflict with the requirements of Section 77 of the Bankruptcy Act and of the decisions of this Court in the *Ecker* Case *supra;* and sanctioned such a departure from the accepted course of proceedings under said statute and the requirements of due process of law as to call for the exercise by this Court of its power of supervision.

(d) Section 77(e) provides that where a plan is disapproved the proceedings shall be dismissed or referred back to the Commission for reconsideration "under the provisions of sub-section (d) hereof." By its order of January 30, 1945* the Circuit Court of Appeals reversed in essential particulars the order of the District Court approving the Fifth Plan and remanded the proceedings to the District Court with power to remand to the Commission *"all or any part of the plan if in his opinion it is desirable to have the Commission consider further any provisions of the plan in addition to those affecting Old Colony."* (Italics provided.)

By this decision the Court in effect undertook to vest in the District Court power and discretion, not given by the statute, to limit the proceedings before the Commission to those questions which *in the opinion of the District Court,* the Commission should consider, and to deny to the parties including petitioners a hearing as to the provisions of any new plan which might affect their interests, in violation of the statute and of the requirements of due process of law. This decision and order presents an important question of Federal law not heretofore decided, and is such a departure from the requirements of the statute and from the accepted and usual course of proceedings thereunder as to call for the exercise of the supervisory power of this Court.

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*Rec. pp. 241, 242.

2. *As to the obligations of the New Haven under the Act of 1896.*—The Act of 1896 named five railroad companies which were given the right to subscribe for the stock of the Terminal Company and were required to use the terminal upon the terms therein prescribed. Following the name of the New Haven in Section 2 of the Act are the descriptive words "being lessee of the Old Colony Railroad Company". The New Haven subscribed in its own right to 1/5 of the stock which it has since held. In addition thereto 1/5 was subscribed by each of its leased or controlled lines, Old Colony, Boston and Providence and New England. It has used the terminal for nearly fifty years as a "system" station.* The Department of Public Utilities in its order of July 17, 1931 fixing the proportions of payments to be made by the several roads on account of the terminal held:

> "Petitioner (New Haven) is one of the original railroads *required to use said union station. In addition* it is successor to the New England Railroad Company and is lessee of the Old Colony Railroad Company and Boston and Providence Railroad." (Italics provided.)

In its opinion on Order 398** the District Court construed the words "being lessee of the Old Colony Railroad Company" in Section 2 of the Act as meaning "as lessee", etc., thus changing words of description† into words of limitation. On this construction of the Act the Court held that the disaffirmance of the Old Colony lease relieved the New Haven from all obligations under the Act of 1896 except as to the lines of the New England which were not then using the terminal. This threw the entire burden of the New

*See opinion of Commissioner Eastman on First Plan, Rec. pp. 7863, 7993, 7998, 8001.

**Rec. pp. 6159, 6161, 6162.

†*Doney* v. *Equitable, etc. Society* (N. Y.) 117 Atl. 618, 619; *James* v. *Supreme Council,* 130 Fed. 1014, 1016.

Haven proportion of 70% of the terminal expense on the short lines and limited revenues of the Old Colony and Boston and Providence.* The burden so created constituted the chief basis on which the Commission sought to modify the provisions of the Act.**

Even if the construction by the District Court of the language of the Act were correct, it would not follow that by the disaffirmance of the Old Colony lease the New Haven could be relieved of the duties and obligations imposed upon it by the Act of 1896. Under the principles clearly stated and discussed in the case of *Murray* v. *Roberts,* 103 Fed. (2d) (CCA 2) 889, 892, 898, it appears that where, in the public interest, an obligation is lawfully imposed by public authority upon the lessee of a public utility, that obligation cannot be avoided by a mere disaffirmance of a lease. The principle there stated seems to be applicable to this case.

The decision of the Circuit Court of Appeals approving the Fifth Plan, based upon the aforesaid construction of the Act of 1896 by the District Court, involves important questions as to the construction of a State statute upon which the decisions of the District Court and the Circuit Court of Appeals appear to be in conflict with the decision of the State Department of Public Utilities, the highest tribunal of the State which has ever construed this provision of the statute; as to the effect of disaffirmance of the lease, it seems to be in conflict with a previous decision of the Circuit Court of Appeals of the Second Circuit. The

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*See opinion Comn. Eastman March 22, 1940, Rec. pp. 7993, 7997; also Second Report of the Commission, Rec. pp. 8037, 8067.

**The question as to the correctness of this construction of the Act by the District Court was raised on appeal from Order 398 but both the Circuit Court of Appeals and this Court decided that case on other grounds and refused to decide or to express any opinion on the question as to the obligations of the New Haven under the Act. See *Webster and Atlas Bank* v. *Palmer,* 111 Fed. (2d) 215; *Palmer* v. *Webster and Atlas Bank,* 312 U. S. 156, 168.

questions so decided are of such public importance as to call for the exercise of its power of supervision by this Court.

3. *As to the modification or abrogation of the provisions of the Massachusetts Act of 1896.*—The Circuit Court of Appeals held* (a) that the mandatory provisions of the Act of 1896 requiring the railroads named therein to use the terminal upon the terms therein stated amounted in effect "to a burdensome lease" and that the approved plan constituted an offer "of a revised arrangement" which the Terminal Company is free to accept or reject; (b) that the Act of 1896 was as to the user railroads an "enabling act" and as such amended their charters; (c) that by the plan the Commission did not amend the Charter of the Terminal Company, but did amend, "as it can do, the Charter of the New Haven"; and (d) that even if the provisions of the Act of 1896 be considered as an exercise of police power of the State they could be "superseded" by the provisions of a duly approved plan of reorganization.

(a) The Third and Fourth plans of the Commission contained no suggestion of an "offer". The provisions of these plans in this respect were absolute.** The District Court "construed" these provisions into an offer.† The Fifth Plan by Section (N)(1)(a) adopted the same proposals as to modification or abrogation of the provisions of the Act of 1896, but accepting the view of the Court, added a provision that the Trustee of the Terminal Company might accept or reject the same and exclude the debtor from the terminal. The obvious purpose was to bring this case within the decision of this Court on the Terre Haute lease in the

*147 F. (2d) 40, 52; Rec. pp. 11525, 11543.
**Rec. pp. 9753, 9850, 9851, 10123, 10210.
†54 Fed. Supp. 622; Rec. p. 10695.

Milwaukee Case* which was cited by the District Court as an "analogy". In that case the Court was dealing with a private lease between two railroads as to which there was clear power to disaffirm. In this case there is no lease. The use of the Terminal by the user railroads and the terms and conditions of such use are prescribed by a mandatory State law binding upon both the Terminal Company and the user railroads.

An offer to have any validity in law must be one which the offeror has legal power to make and the offeree has legal power to accept. The Commission had no power to "disaffirm" a mandatory State statute. Unless and until the Act of 1896 was lawfully amended or repealed to permit of such action, no such offer as is here proposed could be lawfully made by or on behalf of the debtor railroads, nor did the Terminal Company or its Bankruptcy Trustee under the terms of its charter have any power to consider, accept or reject said offer if made. This "offer" was thus illegal and void. The District Court of Massachusetts is administering the property of the Terminal Company under the charter of that company. It has no power to authorize the Bankruptcy Trustees to consider or accept an offer in violation of its Charter or the existing State law; nor has it power to modify the rights of the creditors of the Terminal Company pending a reorganization plan for that company. In these circumstances the offer appears to have no legal significance. The question is whether the Commission by a reorganization plan under Section 77 could amend or repeal the pertinent provisions of the Massachusetts Act of 1896. If the Commission could do this then no offer was necessary. If it could not, the offer was illegal and meaningless.

**Group of Investors* v. *C. M. St. P. & P. R. Co.*, 318 U. S. 523, 546.

(b) The Court held that the Commission did have this power. To reach this conclusion it held that the Act of 1896 as applied to the user railroads was an "enabling act" and as such constituted an amendment to the Charters of the user railroads; that the provisions of the Act of 1896 having thus become a part of their charters, the Commission could by a plan of reorganization under Section 77(b)(5), further amend these charters to modify or abrogate the obligations imposed upon the railroads by the Act.

An "enabling act" is one which enables the beneficiary thereof to do "what it could not do before."* When the Act of 1896 was passed the five user railroads had power to do and were doing a passenger business in Boston. They were not limited to any specific terminal point in that city. In providing for the construction by a separate corporation of "an adequate terminal" and requiring the five railroads named to use that terminal upon the terms therein prescribed for "all of their terminal passenger business in Boston," the State was not requiring or "enabling" these railroads to do anything that they did not already have power to do. The provisions of the act could not have been enforced by the Supreme Judicial Court of Massachusetts by summary process as provided in the act if they only constituted an "enabling act."

The same is true as to the amendment to their Charters. Not every law imposing duties and obligations upon the railroads is an amendment to its Charter.** Since the user railroads had power to do, and were doing, a passenger business in Boston, and to provide terminals for that purpose, no amendment to their respective Charters was needed to enable them to use the Boston Terminal. There was not

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*Bouvier's Law Dictionary, p. 354; 30 CJS p. 237; *Texas* v. *Campbell* (CCA 5) 120 Fed. 2, 191, 193; *Wise* v. *U. S.*, 38 Fed. Supp. 130.

**_Chicago, etc. R.R. Co._ v. _R.R. Commission_, 237 U. S. 220, 234, _Conn._ v. _New Haven, etc. Company_, 43 Conn. 351.

a word or suggestion in the Act of 1896 to indicate an intent to amend the charters of the user railroads. No instance can be found where any of the user railroads have ever included the provisions of this Act in their Charters or in copies thereof filed in legal proceedings. If the Act of 1896 did not constitute an amendment to the Charters of the user railroads then, of course, no amendment to these charters by the Commission, even if it had power to do so, could affect the requirements of that Act.*

(c) Assuming, however, that the Act of 1896 did amend the Charters of the debtors it does not follow that the Commission had power by a plan of reorganization *ex proprio vigore* to further amend those charters. The decision of the Court was based upon the provisions of Section 77(b)(5) that a plan of reorganization "shall *provide* adequate means for the *execution of the plan* which may include the transfer of * * * all or any part of the property of the debtor to another corporation * * * the amendment of the Charter of the debtor," etc. (Italics provided.) The natural and generally accepted interpretation of this provision is that a plan may either provide for the organization of a new corporation, or for obtaining amendments to the Charter of the debtor, if necessary, to conform the same to the capital structure and lawful provisions of the plan. The Committee putting the plan into effect would then either organize a new corporation under State law or obtain from

*The case of *Worcester, et al.* v. *Norwich, etc., R. R. Co., et als.*, 109 Mass. 103 is cited in support of the position taken by the courts below. In that case the statute was attacked by the railroads as an amendment to their charters which the State did not have the Constitutional power to make. The Court, accepting this view as to the statute, held that it was clearly within the reserve power of the State. The question as to whether it was or was not an amendment to the Charters appears not to have been raised or decided. Here the terminal facilities including tracks were provided by a separate corporation created for that purpose and the railroads were only required to use the same which was clearly within their existing charter powers.

the State the necessary amendments to the Charter of the existing corporation in the manner provided by State law. In accordance with this view a number of States have passed special statutes providing for such incorporations or amendments where the stockholders have been eliminated by the plan.*

The function of incorporating a new company or amending existing State charters is legislative—not administrative or judicial. Congress though frequently urged to do so, has consistently refused to incorporate railroads (except on public domain) and it has certainly never undertaken to amend State Charters. It has left these functions entirely to the States. Assuming that it has the power to do so, it can hardly be conceived that it would confer upon the Commission by a phrase of eight words in the midst of a procedural section of an act dealing with "debtor and creditor relations" any such far-reaching power. Any such construction of Section 77(b) (5) as to substantive State legislation would be destructive of the functions of the State, and would raise a serious question as to its Constitutionality.**

(d) The Court of Appeals also held that if the Act of 1896 be considered "an exercise of police power" it could be "superseded" by a "duly approved plan of reorganization."

This Court has held that the police power of a State is "the power to govern men and things within the limits of its dominion"; that it is "inherent in every sovereignty"; that it is one of the "lease limitable of the powers of gov-

*See Ill. Rev. Stats. Chap. 114, Sec. 174.1; Wis. Stats. 1943 Sec. 190.02 (9)(c), 190.01 (3); Laws of Delaware pp. 429, 430; 1 Maryland Annotated Code 1939, Art. 23, § 133.

**_Continental, etc. Bank_ v. _Chicago etc. Railway Co._, 294 U. S. 648; _Ashton_ v. _Cameron County District_, 298 U. S. 513; _U. S._ v. _Bekins_, 304 U. S. 27.

ernment".* That the fact that the duty or obligation imposed by the exercise of police power is "burdensome" does not justify its annulment.** This Court has also held that where a Federal agency seeks to override State laws the grant of power to do so must be so clear and definite as to "compel" that construction.†

Section 77 of the Bankruptcy Act relating only to "debtor and creditor relations" does not appear to contain any such grant of power to the Commission.

The Court below apparently based its decision on this point on (1) the provision of Section 77(f) to the effect that after a plan has been confirmed as being in conformity with the Act it may be carried into effect, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding;" and (2) upon the regulatory powers of the Commission under the Interstate Commerce Act.††

**Slaughterhouse Cases,* 16 Wallace 36, 62; *District of Columbia* v. *Brooke,* 214 U. S. 138, 149; *Erie R. R. Co.* v. *Commissioners,* 254 U. S. 394, 410; *California* v. *Thompson,* 313 U. S. 109, 113.

***Erie R. R. Co.* v. *Commissioners,* 254 U. S. 394, 410; *California* v. *Thompson,* 313 U. S. 109, 113; *Lyford* v. *N. Y.,* 140 Fed. (2d) (CCA 2) 840; *Atchison, etc. Railway Company* v. *R. R. Commission,* 283 U. S. 380, 394, 395.

†*Atchison, etc. Railway Company* v. *Commission,* 283 U. S. 380, 391; *Palmer* v. *Mass.,* 308 U. S. 79, 83, 84; *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 749; *Wisconsin, etc.* v. *C. B. & Q. Railroad,* 257 U. S. 563, 580.

††See opinion of District Court, 54 Fed. Supp. 623; Rec. p. 10695 Opinion of Circuit Court of Appeals, 147 Fed. 2d 40, 52; Rec. pp. 11525, 11543. The Circuit Court of Appeals cites in support of this view the case of *Texas* v. *U. S.,* 292 U. S. 522, 531 which involved the regulatory power of the Commission under the Interstate Commerce Act. It also cites *In re Missouri-Pac. R. R. Co.,* 39 Fed. Supp. 436, 448. The opinion of the District Court in that case was rested upon the *Taylor* case and was never appealed since the plan involved was abandoned. It also cites the case of *Missouri-Pac. R. R. Co.* v. *Thompson,* 134 Fed. (2d) 139 as affirming the previous case. This latter decision not only did not affirm the previous

The powers of the Commission in the formulation of a plan are granted in Section 77(b). The provisions of Section 77(f) do not become operative until *after the plan is confirmed* and relate only to carrying out the plan so confirmed as to which the Commission has no function. The District Court admitted that the language quoted from 77(f) were not "words of grant".* That being true they could not confer any power upon the Commission. The provision of 77(f) would seem to have been intended to relieve the execution of a lawful and confirmed plan from administrative State laws and regulations as to the issue of securities of other similar matters *involved in the execution thereof*. In practice it has been so understood.

The court below cited the case of *Palmer* v. *Massachusetts,* 308 U. S. 79 as authority for its decision on this point.** The question as to the power of the *Commission* to abrogate State laws under Section 77(f) or any other provision of that statute was not presented in that case. It involved only the question of the power of the District Court to disregard local administrative laws in closing certain local stations.

This Court held that the District Court had no such power and further stated that it had been withheld from the Commission "except as part of a complete plan of reorganization for an insolvent road."** A "complete plan of reorganization" is a plan which has been finally held to be within the powers of the Commission and in conformity with the law and confirmed by the Court. Then only do the

*54 Fed. Supp. 623, 625.

**308 U. S. 79, 88. If the construction given this case by the Circuit Court of Appeals has any justification a clarification of the decision by this Court seems highly desirable.

case but related to an entirely different matter. It was apparently cited in error.

provisions of 77(f) become operative which permit the carrying out of such a plan without regard to local administrative requirements *affecting the execution of the plan,* such as approval of security issues and similar matters.

If it were held that this procedural clause which has no relation to the Commission or its functions, conferred upon the Commission power by a plan of reorganization to set aside any State laws which it deemed burdensome, then it could under that clause modify or annul all of State legislation imposing numerous and burdensome duties and obligations upon the railroads for the safety and convenience of the public. Since the taxing power is of no higher dignity than the police power it could also place a ceiling upon the taxes to be imposed upon reorganized railroads by the several States on the ground that the taxes were burdensome. The law so construed would be destructive of our Federal system and would apparently be unconstitutional.*

Both courts below apparently relied also upon the regulatory powers of the Commission under the Interstate Commerce Act.** Powers of the Commission under the Interstate Commerce Act and under the Bankruptcy Act are conferred under different clauses of the Constitution which relate to entirely different subjects. The only reference in Section 77 of the Bankruptcy Act to the powers of the Commission under the Interstate Commerce Act is in sub-section (q) which relates to the issuance of subpoenas. This express reference to one power would seem to exclude others.

The Commission is a statutory body. It may exercise only those powers conferred by the statute under which it

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**Ashton* v. *Cameron County District,* 298 U. S. 513; *U. S.* v. *Bekins,* 304 U. S. 27.

**Opinions of District Court, 54 Fed. Supp. 595, 623, 631, 639. Opinion of Circuit Court, 147 F. (2d) 40, 52; Rec. pp. 11525, 11544.

is acting. This is not a proceeding under the Interstate Commerce Act. In any event that act grants no power to the Commission either in this or any other proceeding to provide for the construction or use of joint terminals or to prescribe the terms thereof except in the one instance covered by Section 3(5) of the Interstate Commerce Act which obviously has no relation to this case.* With that exception the power to require the construction of terminals and fix the terms of their use, has been intentionally left by Congress exclusively to the police power of the States.**

The Commission disclaimed any power under the Interstate Commerce Act to modify the provisions of the Act of 1896 as to the debtor railroads, and rested its claim of such power exclusively upon the provisions of Section 77 of the Bankruptcy Act.† Under the rule stated by this Court in *Securities and Exchange Commission* v. *Chenery*, 318 U. S. 80, 87, the validity of the order of the Commission approving the plan must be judged upon the grounds upon which it is based. The action of the court below in invoking the power of the Commission under the Interstate Commerce Act which was expressly disclaimed by the Commission, seems to be not only without justification but in conflict with the decision of this Court in the *Chenery* case.

This summary of the issues presented by decision of the Circuit Court of Appeals sustaining, upon the several grounds above stated, the power of the Commission by a plan of reorganization in these proceedings to modify or

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*49 U.S.C. § 3(5).

**See Statement of Chairman Esch in discussion of the Transportation Act of 1920, H. R. Cong. Rec. Vol. 58, p. 8578, et seq.; *Missouri, etc. R. R. Co.* v. *Terminal Rwy. Co.*, 104 I. C. C. 203; *Los Angeles Pass. Ter. Cases*, 100 I. C. C. 421, 142 I. C. C. 849; *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331; *Interstate Commerce Comm.* v. *U. S. etc.*, 280 U. S. 52, 61, 62; *Atchison etc. Rwy. Co.* v. *R. R. Comm.*, 283 U. S. 380, 390, 391.

†See Report on Third Plan, Rec. pp. 9753, 9785, 9786.

abrogate the provisions of the Massachusetts Act of 1896 as to the debtor railroads, indicates the important and far reaching character of that decision as affecting both the public interests and those of parties immediately concerned. The decision strikes at the very root of the power of a State "to govern men and things within the limits of its domain"; to exercise control over its domestic affairs in the interest of its people, and thus disturbs the "balance between national and State authority in one of the most sensitive areas of government"; it presents important questions as to the construction and application of a State statute; important questions of Federal law which have not heretofore been decided and which should be settled by this Court. It decides questions of Federal and Constitutional law in a way probably in conflict with applicable decisions of this Court. It manifestly calls for an exercise by this Court of its power of supervision and review.

4. *As to revenues from rentals and concessions.*—The Act of 1896(§10) required the user railroads to pay for use of the terminal "such amounts as may be necessary" to pay the expenses and charges there enumerated which included all expenses and charges of the Terminal.* No express provision was made in the Act for future capital improvements. No mention was made of any revenues which might be derived by the Terminal Company from rentals and concessions in the terminal building or from other sources. These revenues were, of course, property of the Terminal Company. They might be used to provide such capital improvements and thus to increase the security for the bonds or for other proper purposes. Since the institution of the bankruptcy proceedings of the Terminal Company now pending, these revenues are property of the Bankruptcy

*See Act of 1896, § 10, Rec. p. 167.

Trustee and creditors of the Terminal Company. They are under the exclusive jurisdiction of the Massachusetts District Court.* The plan approved by the decision of the Court below provides in effect that these revenues of the Terminal Company (or its Bankruptcy Trustee) should be given to the user railroads as a credit against the expenses which they were required to pay under Section 10 of the Act. The Commission in its Report on the Fourth Plan undertook to justify this action by the statement that it is "quite customary to deduct revenues received from rentals and concessions in computing *net operating costs* of terminal operations."** (Italics provided.) The Commission failed to say, however, that in every instance where this has been done the terminal was financed and constructed by the railroads themselves directly or through a holding company and was used and operated under *private contract, not* under the provisions of a mandatory statute which definitely fixed the rights and obligations of the parties. The statute said nothing about "net operating costs". Petitioners asked leave to introduce evidence to show these facts as well as the amount of such revenues and other relevant facts.† This leave was denied by both the Commission and District Court. The action was affirmed by the court below. This provision of the plan was not only arbitrary and unsupported by evidence, but constituted a direct gift of the property of the Bankruptcy Trustee and creditors of the Terminal Company to the user railroads without due process of law, and without compensation, in violation of the Fifth Amendment to the Constitution of the United States. The decision of the court below on this point decides

*_Isaacs_ v. _Hobbs, etc., Co._, 282 U. S. 734; _Ex parte Baldwin_, 291 U. S. 610.

**Report on Fourth Plan, Rec. pp. 10123, 10162.

†See Offer of Proof, Rec. pp. 144-159; Rec. pp. 11007-11010.

important questions of Federal and Constitutional law which should be settled by this Court, and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this Court.

5. *As to the compromise arrangement embodied in the Joint Report.*—The proposals as to the terminal in the approved plan were made in the Joint Report of the Compromise Committee as part of the compromise plan for the acquisition of Old Colony by New Haven. The Commission and the Court refused to allow petitioners to present evidence as to these proposals and to be heard thereon.* The proposals were adopted by the Commission as submitted by the Committee, including the provisions as to Boston Terminal which were intended to increase the value of Old Colony to New Haven. The Circuit Court of Appeals held that the compromise plan was invalid as to bondholders of Old Colony under the decision of this Court in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106; but held that it was valid as to the terminal interests, although the provisions as to the terminal and Old Colony were all interwoven and inseparable parts of the same compromise arrangement. The Court thus decided an important question of Federal law in a way which was probably in conflict with applicable decisions of this Court, and in such manner as to call for the exercise of the power of supervision of this Court.

6. *The approved plan is not fair and equitable or in accordance with the law of the land.*—So far as is known, this is the only case of a reorganization under Section 77 of the Bankruptcy Act in which it has been sought to modify ex-

*Rec. pp. 10160; 54 Fed. Supp. 595, 627.

penses incident to a terminal facility. Such expenses are always burdensome but they are essential to enable the railroads to perform their functions "for the accommodation of the public".

The conclusion that the terminal was burdensome was not reached upon any study or evidence as to what would be the cost of acquiring or using another terminal facility in Boston. There was no evidence as to the comparative cost of this terminal and others of a similar character throughout the country, including the terminal facilities of New Haven at New York. Petitioners offered to present evidence on all of these questions but leave to do so either before the Commission or the Court was denied.* The conclusion of the Commission was based upon a showing of deficits on the part of the Old Colony due in large part to charging the entire New Haven proportion of the cost of the terminal to the short lines of Old Colony and Boston and Providence.** No part of these charges was assigned to New Haven notwithstanding "that a very important part of the use of that station is in connection with through trains between New York and Boston."† No study was made or evidence adduced as to the earnings and expenses of the passenger traffic in the New York terminal used by New Haven although the report of the Commission indicated that the expenses in that terminal were much higher than at Boston and upon proper study would probably show serious deficits on the western end of the system.†† No suggestion was made of a modification of the cost of New York Terminal operated under contract. Petitioners offered to present evidence as to all of these matters. Leave to do so was denied both by the Commission and the Court. The treatment ac-

*See Offer of Proof, Rec. pp. 144-159; Rec. pp. 11007-11010.

**See Commission's Report of Feb. 18, 1941, Rec. pp. 8037, 8057.

†See Commission's Report of Feb. 18, 1941, Rec. pp. 8037, 8057.

††Rec. pp. 8037, 8066, 8067.

corded Boston Terminal interests by the plan approved by the Court appears, therefore, to have been arbitrary, discriminatory and unsupported by adequate evidence and not in accordance with legal standards.*

Even if the so-called offer contained in §§N(1)(a) and N(1)(b) of the plan be ignored or rejected by the Bankruptcy Trustee of the Terminal Company (as it clearly must be for reasons already stated), the plan if approved becomes effective as to the debtor railroads. Petitioners and other bondholders of the Terminal Company whose security was so carefully safeguarded by the Act of 1896, will have been deprived of their security and property; including the revenues of the terminal from rentals and concessions,** in order to enrich the Old Colony and to make it a more attractive purchase for New Haven. Petitioners will have been denied their right to produce evidence and be heard as to these provisions of the approved plan. As to petitioners the plan is unfair and inequitable and if made effective deprives petitioners of their property without due process of law and without compensation in violation of their legal and Constitutional rights. The decision of the Circuit Court of Appeals affirming the order approving said plan as to petitioners should be reviewed by this Court to the end that the law may be properly administered in accordance with the decisions of this Court, and that the errors herein outlined may be corrected.

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*_Ecker_ v. _Western Pac. R. Corp._, 318 U. S. 448, 473.

**For amount of these revenues by years see Offer of Proof, Rec. pp. 155, 156.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the Second Circuit, demanding that Court to certify and send to this Court a full and complete transcript of the record in all proceedings in this cause; that the cause may be reviewed by this Court that the order of said Court entered on January 30, 1945 may be reversed.

Dated May 22, 1945.

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